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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78691247
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Applied for Mark	NAG CHAMPA
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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re	Shrinivas Sugandhalaya
Serial No.:	78691247
Filed:	August 12, 2005
Mark:	NAG CHAMPA
Class:	003
Examiner:	Jeffrey S DeFord (L.O. 115)

APPLICANT'S APPEAL BRIEF

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THE RECORD

The record in this appeal consists of the following documents and evidence:

- File history for Application Serial No. 78691247, including
 - October 19, 2012 Office Action
 - April 18, 2013 Office Action response
 - June 10, 2013 Office Action
 - December 10, 2013 Request for Reconsideration after Final Office Action
 - March 3, 2014 Office Action
 - September 03, 2014 Office Action response
 - November 24, 2014 Office Action
 - May 26, 2015 Office Action response
 - July 13, 2015 Office Action

PROCEDURAL HISTORY

On August 12, 2005, Applicant filed the present application on an in-use basis, seeking to register the mark NAG CHAMPA (the “Mark”) with goods identified as “incense sticks” with a date of first use of April 30, 1973.

On June 2, 2006, the examiner assigned to the application issued a Notice of Suspension suspending action on the application pending disposition of a pending application not relevant to this appeal.

On October 20, 2009, the examiner issued an Office Action refusing registration of the Mark based on a likelihood of confusion with a prior registration not relevant to this appeal.

On April 20, 2010, Applicant filed a Petition to Cancel the prior registration cited in the prior Office Action and requested suspension of the application pending resolution of the Petition for Cancellation.

On May 4, 2010, the examiner issued a second Notice of Suspension.

On October 10, 2012, Applicant filed a request to remove the application from suspension given that the prior registration cited in the prior Office Action had been cancelled as a result of the Cancellation Action.

On October 19, 2012, the examiner issued an Office Action withdrawing the prior refusal under Section 2(d) of the Trademark Act and refusing registration of the Mark under Section 2(e) of the Trademark Act based on the assertion that the Mark “is merely descriptive because it identifies the Indian fragrance of the incense sticks. NAG CHAMPA is an Indian fragrance commonly found in incense, soap, perfume oil, essential oils, candles and personal toiletries originating from India. It is commonly used in ashrams.”

On April 18, 2013, Applicant responded to the Office Action with arguments that the Mark is not merely descriptive.

On June 10, 2013, the examiner issued an Office Action making final the descriptiveness refusal of the Mark.

On December 10, 2013, Applicant filed a Request for Reconsideration after Final Office Action including a claim of acquired distinctiveness under Section 2(f) of the Trademark Act and filed a Notice of Appeal.

On March 3, 2014, the examiner issued an Office Action stating “In its request applicant attempted to make a Claim of Acquired Distinctiveness under Section 2(f) of the Trademark Act based on five years use. The Claim of Acquired Distinctiveness cannot be addressed because it has not been properly raised as specifically discussed below. This raises a new issue. Therefore, the Final Refusal based on a descriptiveness under Section 2(e)(1), the Request for Reconsideration and the associated appeal are all maintained and a new requirement issued as to the Claim of Acquired Distinctiveness under Section 2(f) of the Trademark Act.”

On September 03, 2014, Applicant responded to the Office Action including a claim of acquired distinctiveness under Section 2(f) of the Trademark Act based on five or more years’ use and based on evidence of acquired distinctiveness.

On November 24, 2014, the examiner issued an Office Action maintaining the Final Refusal based on a descriptiveness under Section 2(e)(1), the Request for Reconsideration and the associated appeal and issuing a new refusal as to the sufficiency of the Acquired Distinctiveness claim under Section 2(f) of the Trademark Act.

On May 26, 2015, Applicant responded to the Office Action with arguments relating to the sufficiency of the Acquired Distinctiveness claim under Section 2(f) of the Trademark Act.

On July 13, 2015, the examiner issued an Office Action maintaining the final refusal based on descriptiveness under Section 2(e)(1) issued June 10, 2013, and making final the refusal of the claim of Acquired Distinctiveness under Section 2(f) of the Trademark Act.

APPLICABLE LEGAL STANDARDS

A mark or term is merely descriptive under Section 2(e)(1) of the Lanham Act if it immediately conveys the ingredients, qualities, or characteristics of the goods or services with which it is used, In re Putnam Publ'g Co., 39 U.S.P.Q.2d 2021, 2022 (T.T.A.B. 1996), or immediately conveys to the viewer the thought of the applicant's goods or services. In re Abcor Development Corp., 200 U.S.P.Q. 215, 218 (T.T.A.B. 1978). However, the attribute or attributes must be described with "some particularity." In re Entenmann's, Inc., 15 U.S.P.Q.2d 1750, 1751 (T.T.A.B. 1990). The examiner bears the burden of demonstrating that a mark is merely descriptive. See In re Pennzoil Products Co., 20 U.S.P.Q.2d 1753, 1758 (T.T.A.B. 1991).¹

By contrast, a mark that requires consumers to use imagination, thought or perception, as well as multi-stage reasoning is a suggestive, inherently distinctive mark. In re WSI Corp., 1 226 U.S.P.Q.2d 1570, 1572 (T.T.A.B. 1986). "There is a thin line between a suggestive and a merely descriptive designation, and where reasonable [persons] may differ," the Board's practice

¹ This is true regardless of whether an applicant appealing a descriptiveness refusal submits any evidence that the mark is not descriptive. See, e.g., In re Vernon Chatman III, Serial Nos. 77261141 and 77261143 (T.T.A.B. 2009) ("Despite the limited information provided by applicant, it is still the Office's burden to prove that a mark is merely descriptive . . . of the identified services.").

is "to resolve the doubt in applicant's favor." In re Intelligent Medical Systems Inc., 5 U.S.P.Q.2d 1674, 1676 (T.T.A.B 1987) (internal citations omitted).

In the alternative, if the Board determines that the Mark is not inherently distinctive, it may be registered on the Principal Register upon proof of acquired distinctiveness, or “secondary meaning,” that is, proof that it has become distinctive as applied to the applicant’s goods or services in commerce. TMEP §1212. If the applicant establishes, to the satisfaction of the examining attorney, that the matter in question has acquired distinctiveness as a mark in relation to the named goods or services, then the mark is registrable on the Principal Register under §2(f) of the Trademark Act, 15 U.S.C. §1052(f).

As applicable here, the following types of evidence may be used to establish acquired distinctiveness under §2(f) for a trademark or service mark:

(1) Five Years’ Use: A statement verified by the applicant that the mark has become distinctive of the applicant’s goods or services by reason of the applicant's substantially exclusive and continuous use of the mark in commerce for the five years before the date on which the claim of distinctiveness is made (37 C.F.R. §2.41(a)(2); see TMEP §§1212.05–1212.05(d)); and

(2) Other Evidence: Other appropriate evidence of acquired distinctiveness (37 C.F.R. §2.41(a)(3); see TMEP §§1212.06–1212.06(e)(iv)).

For marks refused under §2(e)(1), whether the statement of five years’ use is sufficient in and of itself to establish acquired distinctiveness depends on the degree to which the mark is descriptive.

Under Trademark Rule 2.41(a)(3), 37 C.F.R. §2.41(a)(3), an applicant may submit declarations under 37 C.F.R. §2.20 or other appropriate evidence showing the duration, extent, and nature of the applicant’s use of a mark in commerce that may lawfully be regulated by the U.S. Congress, advertising expenditures in connection with such use, letters, or statements from the trade and/or public, or other appropriate evidence tending to show that the mark distinguishes the goods or services. TMEP §1212.06. The kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of

the mark and the circumstances surrounding the use of the mark in each case. Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 1581, 6 U.S.P.Q.2d 1001, 1008 (Fed. Cir. 1988).

ARGUMENT

Applicant respectfully asserts that the Examiner erred in refusing registration of Applicant's Mark based on descriptiveness under Section 2(e)(1) and, in the alternative, refusing to accept Applicant's claim of Acquired Distinctiveness under Section 2(f) of the Trademark Act. Specifically, Applicant respectfully submits that the examiner's arguments, and the evidentiary support for those arguments, do not sufficiently demonstrate that the Mark is merely descriptive or that the mark has not acquired distinctiveness under Trademark Act Section 2(f) based on five years' use and/or other evidence of acquired distinctiveness.

Applicant asserts that Applicant's Mark NAG CHAMPA is inherently distinctive, and, in the alternative², Applicant submits that NAG CHAMPA has acquired distinctiveness under Trademark Act Section 2(f) based on five years' use and/or other evidence of acquired distinctiveness.

October 19, 2012 Office Action

In the October 19, 2012 Office Action, the examiner stated that the Mark is merely descriptive of the identified goods, because "it identifies the Indian fragrance of the incense sticks. NAG CHAMPA is an Indian fragrance commonly found in incense, soap, perfume oil, essential oils, candles and personal toiletries originating from India. It is commonly used in ashrams." To meet his burden of proof, the examiner provides four excerpts from the Internet allegedly showing descriptive use of the wording "nag champa." Applicant respectfully submits that the examiner's argument, and the evidentiary support for that argument, did not sufficiently demonstrate that the Mark is merely descriptive.

² A claim of acquired distinctiveness in the alternative does not constitute a concession that the Mark is not inherently distinctive. See, e.g., In Re E S Robbins Corp., 30 U.S.P.Q.2d 1540 (T.T.A.B. 1992).

Much of the examiner's evidence attached to the October 19, 2012 Office Action is of dubious probative value. First, one of the four excerpts (the Sensia excerpt) provided by the examiner to show common use of "nag champa" actually shows Applicant's product, with NAG CHAMPA prominently shown as a mark. Clearly, such use undermines, rather than supports, a descriptiveness finding. Plyboo America Inc. v. Smith & Fong Co., 51 U.S.P.Q.2d 1633 (T.T.A.B. 1999).

Second, the final piece of evidence shows use of "nag champa" with soaps, oils and other goods that the examiner contends are related to incense sticks. However, evidence of descriptiveness of a term with different goods does not support a finding of descriptiveness for the identified goods. See, e.g. In re The Stroh Brewery Co., 34 U.S.P.Q.2d 1796, 1797 (T.T.A.B. 1995) ("the fact that a term may be descriptive of certain types of goods does not establish that it is likewise descriptive of other types of goods, even if the goods are closely related.").

Finally, a mere four articles or pieces of evidence of allegedly descriptive use is simply not a convincing showing of common descriptive use of "nag champa." See, e.g., In re Lockheed Martin Corp., Serial No. 85073741, T.T.A.B. Nov. 15, 2012 (unpublished) ("these three news items alone are scant evidence of the meaning of applicant's mark to customers and the trade.").

Further, the examiner did not provide any explanation of the specific meaning of the constituent terms "Nag" and "Champa" in the mark, or of the meaning of those terms in combination. Applicant provides these terms translate from the Hindi language as "snake" and "flower." [(see Nag Definition, attached to April 18, 2013 Office Action Response, Oxford English Dictionary, <http://www.oed.com> (last visited Apr. 16, 2013); Champa Definition, Oxford English Dictionary, <http://www.oed.com> (last visited Apr. 16, 2013)]. While "Champa" has some relationship to the scent of Applicant's incense sticks, "Nag" – "snake" – has no relevant at all to incense sticks. Further, the combination of these terms has no descriptive relationship to incense sticks. See, e.g., Firestone Tire & Rubber Co. v. Goodyear Tire & Rubber Co., 186 U.S.P.Q.

557, 559 (T.T.A.B. 1975) ("[i]t does not follow, however, that because the components of a compound mark are descriptive, . . . the mark in its entirety is descriptive.").

Some background regarding the creation of the Mark, and its international recognition, provides additional support for the Mark's distinctive connotation. As noted in the declaration (the "Declaration") of Mr. Vijaya Kumaran P.V., Applicant's General Manager, attached to Applicant's April 18, 2013 Office Action response, in roughly 1964, Applicant's founder Shri. K. N. S. Setty invented a perfume that he used in an incense stick. He branded the product as NAG CHAMPA agarbatti (incense stick), after his son's first name NAGRAJ and his daughter's nickname CHAMPA.

Applicant respectfully submits that the evidence supplied by the examiner does not sufficiently demonstrate that the Mark is merely descriptive.

June 10, 2013 and March 3, 2014 Office Actions

In the June 10, 2013 Office Action, the examiner argues that “the mark is merely descriptive because it identifies the Indian fragrance of the incense sticks. NAG CHAMPA is an Indian fragrance commonly found in incense, soap, perfume oil, essential oils, candles and personal toiletries originally originating from India and now from all over. It is commonly used in ashrams.” In support of this assertion, the examiner provided “multiple manufactures, including 15 other than the applicant and several individuals manufacturing and/or selling incense all showing the use of NAG CHAMPA to describe the fragrance of incense. Additionally the examining attorney has provided several examples of Nag Champa fragrance oil used in aromatherapy and to manufacture incense. This evidence shows that both the applicant and many other large and small incense manufacturers and distributors use NAG CHAMPA to describe the fragrance of their incense. (see attached evidence).” The Examiner also provided two United States Trademark Registrations showing the disclaimer of the wording NAG CHAMPA for “nag champa incense and incense sticks” and “Incense sticks; incense cones; hand and body lotions; body soap; perfume oils; shampoo; and massage oils” and “Candles”. Finally,

the examiner argues that “the evidence of record indicates that the word CHAMPA in Hindi means flower of the Champac tree and that the word NAG in Hindi means snake and when combined they now have a specific and well known meaning that describes a particular fragrance used in incense, oils and other fragranced products. NAG CHAMPA is actually just the name of a rather exotic and distinctive perfume oil originally manufactured in the Hindu and Buddhist monasteries of India and Nepal. It's a unique floral fragrance with musky overtones and has traditionally been made from a sandalwood base, to which are added a variety of flower oils - including that from the flower of the Champac tree. NAG CHAMPA has become the name of a specific fragrance.”

Applicant respectfully asserts that the third party use submitted by the Examiner does not evidence that the Mark is highly descriptive or generic.

1. The Internet articles submitted by the Examiner were not obtained from a competent source

Evidence of the public's understanding of a term can be obtained from any competent source, including dictionary definitions, research databases, newspapers, and other publications. *See* TMEP 1209.01(c)(i).

It is undisputed that the wording “NAG CHAMPA” is not defined in a dictionary. See Exhibit C to September 3, 2014 Office Action Response. Instead, the Examiner relies almost entirely on Internet printouts in support of the assertion that the “[M]ark is used by numerous third parties to identify the same goods and also to indicate and identify the fragrance or scent of those goods as well as candles, aromatherapy oils, oils and other fragranced or scented goods.”

However, the printouts of articles from the Internet submitted by the Examiner do not constitute clear evidence that the relevant consuming public understands the wording “NAG CHAMPA” to primarily refer to the specific genus of goods offered under Applicant's mark in that they do not constitute evidence obtained from a competent source as contemplated by TMEP 1209.01(c)(i).

TMEP §710.01(b) provides that “Articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. However, the weight given to this evidence must be carefully evaluated, because the source may be unknown.” *Id.* (emphasis added) (citing *In re Total Quality Grp. Inc.*, 51 U.S.P.Q.2d 1474, 1475-76 (T.T.A.B. 1999); *Raccioppi v. Apogee Inc.*, 47 U.S.P.Q.2d 1368, 1370-71 (T.T.A.B. 1998)). Here, the articles downloaded from the Internet should be treated as having limited probative value because the source of each article is unknown.

With respect to evidence taken from eHow, wiseGEEK, eBay, and thingsiask.com, the Board has noted that “[t]here are inherent problems regarding the reliability of [a] collaborative website that permits anyone to edit the entries,” and, with regard to Wikipedia has stated as follows:

[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)....As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia’s sources.

TMEP §710.01(b) (citing *In re IP Carrier Consulting Grp.*, 84 U.S.P.Q.2d 1028, 1032-33 (T.T.A.B. 2007)). As with Wikipedia, eHow, wiseGEEK, eBay, and thingsiask.com³ are similarly unreliable sources, as they are secondary sources of information or compilations based on other sources. See Exhibit D to September 3, 2014 Office Action Response. As the eHow, wiseGEEK, eBay, and thingsiask.com entries for “NAG CHAMPA” cited to by the Examiner also include no reference as to the source of the listed information such that they cannot be

³ Applicant notes that thingsiask.com is no longer an active website.

corroborated, it should be treated as having limited probative value in that it may in fact be comprised of erroneous information.

The remaining articles the Examiner cites are from “Dave’s Garden,” “Hawaiian Tropical Plant Nursery,” and “Sensia,”⁴ these websites are unknown or obscure, and thus also of limited value. TMEP §710.01(b).

Given their limited probative value, the printouts of articles from the Internet submitted by the Examiner with the June 10, 2013 and March 3, 2014 Office Actions do not constitute evidence obtained from a competent source as contemplated by TMEP 1209.01(c)(i). Accordingly, these articles neither serve as evidence that the Mark is merely descriptive nor to refute Applicant’s showing of acquired distinctiveness.

2. The Internet articles do not constitute clear evidence that the wording NAG CHAMPA primarily refers to Applicant’s goods

Even if the Internet articles submitted by the Examiner are deemed to constitute evidence obtained from a competent source, these printouts do not refute that the relevant consuming public views the Mark as an indicator of origin, because the printouts consist of casual, non-purchasing uses of “Nag Champa.” Given that the wording “NAG CHAMPA” also functions as a source identifier for Applicant’s incense products in the marketplace, the wording is capable of functioning as a trademark.

By way of analogy, even though the wording KLEENEX has a widely understood meaning of a facial tissue, given that there is evidence that KLEENEX also functions as a source identifier of a particular brand of facial tissue, it concurrently functions as a trademark. As explained by the authors of the Cardozo Law Review article entitled *Confronting the Genericism Conundrum*:

Consider that a person with a cold can walk into a colleague’s office, ask for a “kleenex” and be handed a tissue but not a Kleenex®-brand tissue. At that moment the person with the runny nose is likely to accept the tissue offered without complaining or caring about the brand. When that same person is in a supermarket, however, he may certainly care whether he buys Kleenex® versus Puffs® brand facial tissue, due to his experience with the brands’ relative softness or thickness. Indeed, he might be confused if a box of facial tissue were labeled

⁴ Applicant again notes that the Sensia article features Applicant’s goods.

“Puffs Kleenex.” The key question should be whether consumers still perceive KLEENEX as a source-identifier in the marketplace, not whether they use “kleenex” as a common noun, as they undoubtedly do in other settings.

See Rierson and Desai, Confronting the Genericism Conundrum, 28 Cardozo L. Rev. 1789, 1847 (2007). See Exhibit E to September 3, 2014 Office Action Response. In addition, the fact that purchasers may call for or order a product by a term does not evidence that the term ceases to function as a source identifier. See In re DC Comics, Inc., 689 F.2d 1042 (C.C.P.A. 1982) (“[T]hat purchasers call for a particular product by the name given it by its producer or source does not negate its function as a mark.”)

Given that vast amount of information available to the consumer and consumer awareness of substitute generic products for brand products, consumers are more likely to be able to use a brand name generically in common speech but as a source-identifier when consuming. *See Rierson and Desai, Confronting the Genericism Conundrum*, 28 Cardozo L. Rev. at 1848.

3. The printouts from eBay and Amazon attached to the Office Actions do not refute that the purchasing public views the Mark as an indicator of origin.

The printouts from eBay and Amazon attached to the June 10, 2013 and March 13, 2014 Office Actions do not refute that the purchasing public views the Mark as an indicator of origin for two reasons. First, sellers on eBay and Amazon often use the brand names of competitive products as tags to direct consumers to their competitive products. Thus, the printouts from eBay and Amazon showing third-party usage of “Nag Champa” as a tag to direct consumers to competitive products do not refute that the purchasing public views the Mark as an indicator of origin. In fact, in several of these uses, Applicant’s products are pictured at the bottom of these pages under “People who viewed this item also viewed,” thereby evidencing that the public making purchasing decisions on eBay and Amazon understands NAG CHAMPA to refer to Applicant’s products.

Second, the printouts from eBay and Amazon attached to the Office Actions that show parties selling products that incorporate the wording “Nag Champa” on product packaging do not refute the public’s understanding of “Nag Champa” as a source identifier, but instead serve as evidence of third party efforts to use “Nag Champa” as a source identifier for their particular goods. Applicant has taken numerous steps to address and stop such infringing third party

activity, including sending demand letters to parties filing applications to register marks containing NAG CHAMPA, and in one case filing a lawsuit for trademark infringement. Applicant's efforts to ensure that "Nag Champa" is not used by third-parties to identify the source of their incense products is relevant to establishing that the wording "NAG CHAMPA" functions as a source identifier only as to Applicant's incense products.

As discussed in Section 6, below, in a current search of the wording "nag champa incense" on eBay and Amazon, the first 50 search results and first page of results, respectively, show primarily Applicant's NAG CHAMPA brand incense products, either on packaging displaying the Mark or in bulk. See Exhibits A and B to September 3, 2014 Office Action Response.

Accordingly, the evidence shows that the wording "NAG CHAMPA" functions as a source identifier for Applicant's incense products, and that the relevant consuming public understands "Nag Champa Incense" to refer primarily to SATYA SAI BABA NAG CHAMPA brand incense products.

4. The printouts from Google attached to the Office Actions do not refute that the purchasing public views the Mark as an indicator of origin.

The Google search results attached to the June 10, 2013 and March 3, 2014 Office Actions also do not refute that the purchasing public views the Mark as an indicator of origin, in fact, it may support that fact. "A list of Internet search results generally has little probative value, because such a list does not show the context in which the term is used on the listed web pages. TMEP §710.01(b) (citing In re BayerAG, 488 F.3d 960, 967, 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007) (deeming Google® search results that provided very little context of the use of ASPIRINA to be "of little value in assessing the consumer public perception of the ASPIRINA mark"). In fact, Google supports that the Mark serves as an indicator of origin in that a search of the Applicant's name and the Mark reveals over 16,400 hits. See Exhibit F to September 3, 2014 Office Action Response.

5. The registrations submitted by the Examiner do not refute that the purchasing public views the Mark as an indicator of origin.

Finally, the Examiner relies on two prior registrations as evidence that the public does not view "Nag Champa" as an indicator of origin. Applicant notes that the Reg. No. 3612441 was canceled following a cancellation proceeding brought by Applicant.

Registration No. 4073674 for the mark PPURE NAGCHAMPA does not establish that the public views the Mark as an indicator of origin because third-party registrations are not conclusive on the question of descriptiveness. Each case must stand on its own merits. See TMEP 1209.03(a).

Where, as here, the evidence shows that the public understands NAG CHAMPA to refer to Applicant's products, this registration does not serve as evidence of the public's understanding of the wording "Nag Champa."

6. The Mark has acquired distinctiveness.

Applicant began using the Mark in commerce in the U.S. in April of 1973. This long-term use of the Mark in commerce for more than 40 years evidences that the Mark has acquired distinctiveness. See In re Uncle Sam Chem. Co., 229 U.S.P.Q. 233, 235 (T.T.A.B. 1986) (finding §2(f) claim of acquired distinctiveness of SPRAYZON for "cleaning preparations and degreasers for industrial and institutional use" persuasive where applicant had submitted declaration of its president supporting sales figures and attesting to over eighteen years of substantially exclusive and continuous use).

As noted in the Declaration attached to Applicant's April 18, 2013 Office Action Response, Applicant's sales of its NAG CHAMPA incense have been significant worldwide, totaling nearly \$50 million worldwide and nearly \$40 million in the United States between 2003 and 2013. Further, the Mark has been registered in numerous other countries. *See* the copies of registration certificates attached to the Declaration. Taken together, this evidence establishes that the Mark has acquired distinctiveness. See In re Uncle Sam Chem. Co., 229 U.S.P.Q. at 235.

Further, in a search of the wording "nag champa incense" on eBay, the first 50 search results sorted by "Best Match" show primarily NAG CHAMPA brand incense products, either on packaging displaying the Mark or in bulk. See Exhibit A to the September 3, 2014 Office Action Response. eBay's search algorithms sort "Best Match" results by the most frequently viewed and purchased products containing the relevant search terms. Thus, this evidence shows

that the wording “NAG CHAMPA” functions as a source identifier for Applicant’s incense products, and that the relevant consuming public understands “Nag Champa Incense” to refer primarily to NAG CHAMPA brand incense products. *Id.*

Similarly, in a search of the wording “nag champa incense” on Amazon.com, the first page of search results show primarily NAG CHAMPA brand incense products, either on packaging displaying the Mark or in bulk. See Exhibit B to the September 3, 2014 Office Action Response.

Thus, this evidence shows that the wording “NAG CHAMPA” functions as a source identifier for Applicant’s incense products, and that the relevant consuming public understands “Nag Champa Incense” to refer primarily to NAG CHAMPA brand incense products. *Id.* Applicant submits that these facts support a finding that NAG CHAMPA has acquired distinctiveness as a source indicator for Applicant's goods.

November 24, 2014 Office Action

In the November 24, 2014 Office Action, the examiner stated “the Section 2(f) claim itself and now the additional supporting evidence is insufficient to show acquired distinctiveness because the words ‘NAG CHAMPA’ in the applied-for mark are highly descriptive of applicant’s goods and the applicant does not have substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement.” In support of this assertion, the examiner attached additional Internet printouts, LexisNexis® articles and article from the online ProQuest Dialog database showing use of the wording “nag champa” with incense and fragrance-related products to supplement the previous evidence made of record.

As the eHow, FourSquare, Hither & Yon, NSTperfume.com, Oklahomahandmadesoap.com, salonisbeautysolutions.com, sarawen.com, Stronghold Smoke n Stuff (referring to Applicant’s NAG CHAMPA product), and The Perfumed Court entries for “NAG CHAMPA” cited to by the Examiner also include no reference as to the source of the listed information such that they cannot be corroborated, it should be treated as having limited probative value in that it may in fact be comprised of erroneous information. Further, these

websites are unknown or obscure, and thus also of limited value. TMEP §710.01(b). Several of these sites also refer to Applicant's NAG CHAMPA product. Given their limited probative value, the printouts of articles from the Internet submitted by the Examiner with the November 24, 2014 Office Action do not constitute evidence obtained from a competent source as contemplated by TMEP 1209.01(c)(i). Accordingly, these articles do not refute Applicant's showing of acquired distinctiveness.

The LexisNexis® articles relied upon by the examiner do not refute that the relevant consuming public views the Mark as an indicator of origin because the printouts consist of casual, non-purchasing uses of "Nag Champa." Given that the wording "NAG CHAMPA" also functions as a source identifier for Applicant's incense products in the marketplace, the wording is capable of functioning as a trademark. Further, it is impossible to determine whether the LexisNexis articles referred to by the examiner are referencing Applicant's NAG CHAMPA product.

Accordingly, the Internet evidence and articles provided by the examiner neither serve as evidence that the Mark is merely descriptive nor to refute Applicant's showing of acquired distinctiveness.

CONCLUSION

As the T.T.A.B. has often stated, "there is a thin line of demarcation between a suggestive mark and a merely descriptive one." In re ObjectStyle, LLC, Serial No. 76632896 (T.T.A.B. 2008), citing In re Atavio, 25 U.S.P.Q.2d 1361 (T.T.A.B. 1992). Any doubt on the issue of descriptiveness must be resolved in the applicant's favor. In re Merrill Lynch, Pierce, Fenner, and Smith, Inc., 828 F.2d 1567, 4 U.S.P.Q.2d 1141, 1144 (Fed. Cir. 1987).

The examiner must provide substantial evidence of descriptiveness; *de minimus* examples of descriptive use do not meet the examiner's burden. See, e.g., In re Dikran M. Iskenderian, Serial No. 77266461 (T.T.A.B. 2009) ("The Examining Attorney's strongest evidence . . . is simply insufficient to demonstrate that consumers would immediately ascribe a particular

meaning to applicant's mark.); In re mental images G.m.b.H. & Co., Serial No. 75719666 (T.T.A.B. 2002) ("although a few of the examples of use of the term "incremental images" made of record by the Examining Attorney might well support her position herein, upon weighing all the evidence in this record, we are not persuaded to adopt her position."). While there may be a relationship between Applicant's mark and the goods identified in the application, that fact does not answer the descriptiveness question. See, e.g., In re Vernon Chatman III, Serial Nos. 77261141 and 77261143 (descriptiveness refusal reversed despite the Board's finding that "one can determine how applicant's mark has been derived by looking to the definitions and uses of the various words").

Given that the evidence provided by the examiner is of limited probative value, such evidence does not establish that Applicant's use the Mark has not been substantially exclusive or continuous for the five years before the September 3, 2014 date on which the claim of distinctiveness was made. Even if a claim of acquired distinctiveness based on length of use were deemed insufficient, Applicant has submitted sufficient evidence to show that the Mark has acquired distinctiveness in the minds of the consuming public.

Thus, for the reasons discussed above, Applicant's Mark NAG CHAMPA is inherently distinctive, and, in the alternative, Applicant's Mark has acquired distinctiveness under Trademark Act Section 2(f) based on length of use and/or other evidence. Applicant respectfully requests that the decision of the examiner be reversed and Applicant's Mark be approved for publication in the Principal Register.

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